U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 11 2004
SRC 02 178 53348

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 103(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO), on appeal. The appeal will be dismissed.

The petitioner is a telecommunications consulting company. It seeks to employ the beneficiary permanently in the United States as an electrical engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification filed on February 1, 2001, and approved by the Department of Labor (DOL), on September 29, 2001. The director determined that the petitioner had not established that the beneficiary met the educational requirements of the labor certification as of the petitioner's priority date; the date the labor certification was initially filed with DOL.

On appeal, counsel submitted a brief.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

8 CFR § 204.5(l)(3)(ii) states:

> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.
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> (C) *Professionals.* If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

Eligibility in this matter hinges on the petitioner demonstrating that the beneficiary has the qualifications stated on the ETA 750 labor certification. The ETA 750 labor certification submitted in this case clearly states that the proffered position requires that the beneficiary have a bachelor's degree in Electrical Engineering, Telecommunications Engineering, or "MIS."

With the petition, counsel submitted the labor certification, copies of financial statements of the company, a copy of the beneficiary's passport, visas and Form I-94, copies of the beneficiary's diploma and transcripts pertaining to her Bachelor's degree in Civil Engineering issued by the Mapua Institute of Technology in the Philippines, a copy of her professional license, and letters from previous employers verifying her experience.

On November 15, 2002, the Service Center sent the petitioner a Request for Additional Evidence (RFE), seeking additional evidence of the petitioner's ability to pay the proffered wage, and additional evidence demonstrating that the beneficiary satisfied the educational, training and experience requirements specified on the labor certification. Specifically, the Service Center requested copies of the beneficiary's W-2 for 2000

and 2001 as evidence of the wages paid to the beneficiary. Additionally, the petitioner was asked to submit evidence that the beneficiary had a Bachelor's degree in Electrical Engineering.

In response, on December 10, 2002, counsel submitted various documents, including: 1) a response letter from the petitioner; 2) the petitioner's 2001 tax return; 3) the petitioner's profit & loss report for January 1 to November 26, 2002; 3) the beneficiary's W-2 forms for 2000 and 2001; and 4) additional copies of the previously submitted supporting letters and certificates for the beneficiary.

Following receipt of the information, the director issued a decision on December 18, 2002, finding that the evidence did not demonstrate that the beneficiary had a Bachelor's degree in Electrical Engineering, Telecommunications Engineering or MIS. Consequently, the director denied the petition.

On appeal, counsel submitted a brief, and additional evidence in the form of the beneficiary's curriculum vitae, two letters from the beneficiary's previous employers, and an evaluation of the beneficiary's education and work experience prepared by Global Education Group, Inc., dated January 14, 2003. Counsel argues that the director's finding that the beneficiary lacked the necessary degree in Electrical Engineering is contrary to court holdings which "have viewed the level of knowledge, not the degree, as important." (Counsel's Brief at pp.2-3.) In support of his argument, counsel cites to two district court cases, *Augat, Inc. v. Tobar,* 719 F.Supp. 1158 (D.Mass 1989), and *Hong Kong TV Video Program, Inc. v. Ilchert,* 685 F. Supp. 712 (N.D. Cal. 1988).[1]

We are not persuaded by counsel's argument. First, we do not agree with counsel that the cases cited lend support for his position that the instant petition should be approved. The cited cases differ significantly from the instant case in terms of the issues and legal framework involved. *Augat,Inc.,* involved a situation where the petitioner submitted a petition to the Immigration and Naturalization Service ("INS" now "CIS") for a third preference visa pursuant to 8 U.S.C. § 1153(a)(3). The petition was denied based on the INS' finding that the beneficiary lacked a baccalaureate degree, and its conclusion that a combination of education, training, and experience would be inadequate to demonstrate that the beneficiary qualified as a "member of the professions" under the statute. While the district court did conclude that the INS had abused its discretion in finding that the beneficiary did not qualify without a bachelor's degree, the issue was whether an individual could qualify as a professional without possessing a bachelor's degree. While the court in *Augat, Inc.,* found that the individual did not need to possess a bachelor's degree, and could be considered a member of the professions based on training and experience alone, that court's holding flowed from its interpretation of the predecessor statute then in effect, which did not explicitly contain a degree requirement.

Similarly, counsel's reliance upon *Hong Kong TV Video Program, Inc., v. Ilchert,* 685 F.Supp. 712 (N.C. Cal. 1988) is misplaced. According to counsel, it likewise, demonstrates that the courts do not support a degree requirement. (Counsel's Brief at pp.2-3.) However, the court was examining whether the INS had abused its discretion in denying the petition for the beneficiary as a temporary worker of "distinguished merit and ability" pursuant to 8 U.S.C. § 101(a)(15)(H)(i). The court, as in *Augat, Inc.*, found that the INS had abused its discretion in finding that the position of president and chief executive officer would not qualify as a profession, and that the beneficiary was not a member of the professions due to the lack of a degree.

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[1] We note that while published, the district court decisions lack precedential value and would not be binding upon the AAO. Nevertheless, such decisions are instructive, and we will proceed to evaluate the findings on those cases. *See Matter of K-S,* 20 I&N Dec. 715, 719 (BIA 1993).

Although counsel is correct regarding the findings in these cases, he misperceives their applicability to the facts in this case. The courts were interpreting a predecessor to the current statute, or a different statute altogether. The current statute, section 203(b)(3)(A)(ii) of the Act is explicit in its requirement that professionals are "qualified immigrants who hold baccalaureate degrees and who are members of the professions." This change to the statutory provision came about as a result of section 121 of the Immigration Act of 1990, Public Law 101-649, November 29, 1990 (IIMMACT). Neither the statute nor the regulations allow the substitution of experience, in whole or in part, for the requisite education as stated on an approved labor certification, and counsel has offered no current authority in support of the position he espouses.

Regardless, the issue in this case is not whether the beneficiary is a professional, but whether she meets the requirements of the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position; CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Moreover, while the petitioner submitted an evaluation concluding that her degree and experience is equivalent to a bachelor's degree in electrical engineer, that conclusion is not binding on us. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

The result in this matter is the same whether the petition is analyzed as a petition for a professional under Section 203(b)(3)(A)(ii) of the Act or as a petition for a skilled worker under Section 203(b)(3)(A)(i) of the Act. If the petition is for a professional, then pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(C), the petitioner must show that the beneficiary has a bachelor's degree and demonstrate the areas of concentration of the degree, and that such a degree is a prerequisite for entry into the occupation. If the petition is for a skilled worker, then pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(B), the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA 750 which, in this case, includes a bachelor's degree in Electrical Engineering, Telecommunications Engineering, or MIS. Thus, the beneficiary was required to have a bachelor's degree in one of those fields, as noted on the Form ETA 750. We note that the Occupational Outlook Handbook, published online at www.bls.gov/oco, defines the fields of civil and electrical engineering quite differently.

The evidence does not reflect that the beneficiary possesses the necessary degree as specified in the ETA 750. The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA was certified by the Department of Labor. Since that was not done, the director's decision to deny the petition on this basis must be affirmed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER**: The appeal is dismissed.

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